79-9154

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. ____

ANA MARIA DOMINGUEZ,

Petitioner,

—v.—

ABRAHAM D. BEAME, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DEBORAH M. GREENBERG
MARGARET K. BROOKS
Legal Action Center of the
City of New York, Inc.
19 West 44 Street
New York, New York 10036
(212) 997-0110

Attorneys for Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-

ANA MARIA DOMINGUEZ

Petitioner,

against

ABRAHAM D. BEAME, individually and in his official capacity as Mayor of the City of New York, and his successors in office; MICHAEL J. CODD, individually and in his official capacity as Commissioner of the Police Department of the City of New York, and his successors in office; SIDNEY BAUMGARTEN, individually and in his official capacity as Assistant to the Mayor of the City of New York and as Chairman of the Midtown Law Enforcement Coordinating Committee, and his successors in office; THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; SYLVESTER BONARTI, individually and in his official capacity as a police officer of the City of New York; FRANCIS COLLETTI, individually and in his offical capacity as a police officer of the City of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 603 F.2d 337 and is printed in the Appendix at pp. A1-A22. The opinion of the district court is not reported and is printed in the Appendix at pp. A23-A35.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 29, 1979. Petition for rehearing was denied on September 13, 1979. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is a Police Department policy which directed officers to arrest persons for conduct which does not amount to probable cause an official policy responsible for the deprivation of constitutional rights under Monell v. Department of Social Services for which the Police Department may be sued?

2. May a Police Department invoke a good faith defense in an action brought under 42 U.S.C. §1983; and if so, is a Police Department entitled to such a defense

where it acted contrary to well-settled law and the opinion of its own legal counsel?

3. Are police officers who make an illegal arrest, despite well-settled law and the opinion of the Police Department's own legal counsel that such an arrest would violate the Constitution, entitled to a good faith defense in an action brought under 42 U.S.C. §1983?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

New York Penal Law §240.20(5)

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk

thereof: . . .

5. He obstructs vehicular or pedestrian traffic. . . .

STATEMENT OF THE CASE

Until 1973, women who were suspected by the New York City Police Department of being engaged in prostitution-related activities, but against whom an arrest for prostitution could not be sustained, were arrested for "loitering." In 1973, when the New York Court of Appeals struck down New York's loitering statute,[1/] the Police Department adopted the policy and practice of charging women they suspected of being prostitutes with violations of New York's "disorderly conduct" statute, Penal Law §240.20(5).

The policy, as described by the district court and acknowledged by defendants, equated "engaging unknown males in conversation" with blocking pedestrian or vehicular traffic and intending to cause public inconvenience, annoyance or alarm (A. 26-27; Pl. Ex. 21). Pursuant to this policy, police officers were directed to arrest people on charges of disorderly conduct after observing one or more instances of their

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1/ People v. Berck, 32 N.Y.2d 567 (1973).

approaching males to converse. (Def.'s Brief to the Court of Appeals at 25; Tr. at 187-88).[2/] According to the police, "if someone were to approach someone and engage them in a fifteen second conversation," that person could be arrested for disorderly conduct. (Tr. at 188). Arrests made pursuant to this policy came to be known as "dis-con-pros" arrests. Women arrested for "dis-con-pros" were routinely detained overnight and released the following morning when the district attorney dismissed the charges as legally insufficient.[3/] (A. 5; A. 31).

The particulars of the "dis-con-pros" policy were discussed widely inside and outside the Department. (Tr. at 184-5). Each year tens of thousands of "dis-con-pros" arrests were made in midtown Manhattan alone. (Tr. at 188). The Police Department and the District Attorney's office thus filled out and reviewed many thousands of forms each year, charging women observed "engaging unknown males in conversation" with violating the disorderly conduct statute and dismissing the charges for legal insufficiency.

2/ "Tr." refers to the transcript of the trial held by the district court.

3/ This process of dismissing "dis-con-pros" arrests was called "343-ing," the number referring to the form which the district attorney's office used to formalize its decision.

On November 8, 1975 Officers Sylvester Bonarti and Francis Colletti arrested petitioner and detained her overnight pursuant to this policy. By written directive on October 24, 1975, 20th Precinct Commanding Officer Edward McCabe had ordered Bonarti to conduct a "prostitution roundup" on the night in question. (Def.'s Ex. A.) Both Captain McCabe and Officer Bonarti testified at trial that they expected that the women rounded up would be charged with violating Penal Law §240.20(5). (Tr. at 100, 119). The directive itself contemplated that the charges would be "343'd" (i.e., dismissed by the District Attorney). (Def.'s Ex. A.)

Prior to November 8, the "prostitution roundup" memorandum was sent as a matter of course to Assistant Chief Inspector Charles McCarthy, a high-ranking police official whose command included half of Manhattan. In response to the roundup memorandum, a Police Department legal advisor within Chief McCarthy's command submitted to the Chief a written formal legal opinion that the planned police activity — arresting women observed engaging in solicitation and lodging against them disorderly conduct charges which would not and could not be sustained — was unlawful and would "expose police officers and their supervisors to liability for which there is no 'good faith' defense." (Def.'s Ex. B.). Chief McCarthy nevertheless directed

that the roundup proceed as scheduled. It did, and petitioner was consequently arrested, charged with "engag[ing] various unknown males in conversation thereby causing an inconvenience to vehicle and pedestrian traffic," and detained until the charge was "343'd" by the District Attorney.

Petitioner subsequently brought suit. After trial, the district court concluded that her arrest was indeed unlawful since fifty years of "well settled" state law and the Practice Commentary to the statute established beyond doubt that the activity which petitioner was reportedly observed engaging in "was not within the scope of activities the legislature had sought to prohibit in its enactment" of Penal Law §240.20(5), and "could never rise to the level of disorderly conduct." (A. 28-29).[4/] The district court also concluded, however, that the arresting officers, Police Commissioner Codd, and the Department as an entity had satisfactorily established the defense of "good faith," and were therefore immune from suit for damages. Accordingly, the

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[4/] Practice Commentaries, which are written by highly regarded members of the New York State Bar who often assisted in the drafting of the law, are compiled in New York's official statute books and often relied upon by judges and attorneys.

complaint was dismissed.[5/]

On appeal the United States Court of Appeals for the Second Circuit concurred in the district court's judgment that the arrest proceeded without probable cause and therefore violated petitioner's constitutional rights. A majority of the panel agreed that the arresting officers were entitled to good faith immunity. As to the Department itself and Commissioner Codd, the Court of Appeals ruled that "there was no departmental policy . . . [or] custom to arrest suspected prostitutes under the 'disorderly conduct' statute in the absence of probable cause" and thus found it unnecessary to explore whether a good faith defense was available and, if so, whether it had been established. The dismissal was accordingly affirmed.[6/] Rehearing and request for rehearing en banc were denied.

5/ The district court failed to reach petitioner's claim that her arrest was based on presumed status in violation of the Eighth Amendment, and rejected her claim that her arrest and detention constituted summary punishment, in violation of the Due Process Clause. (A. at 30-32). Petitioner's claims against Mayor Abraham Beame and Mayoral Assistant Sidney Baumgarten were dismissed.

6/ The Court of Appeals entertained petitioner's "status" and "summary punishment" arguments but ruled adversely to her on both.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Erroneously Resolved an Issue Crucial to the Future of Civil Rights Litigation -- When a Municipal Body May be Held Liable Under Section 1983 for a Policy That Is Responsible for the Deprivation of Constitutional Rights.

In the instant case the liability of the Police Department and Police Commissioner Codd hinges on a determination of whether the unconstitutional arrest of petitioner was made pursuant to an official policy or custom for which the Department and its Commissioner could be held responsible under §1983 and Monell v. Department of Social Services, 436 U.S. 658 (1978). This Court has not yet enunciated the criteria for identifying such an official policy or custom, and should do so now.

This standard is crucial to the future of civil rights litigation under Monell and §1983. See Schnapper, "Civil Rights Litigation After Monell," 79 Colum. L. Rev. 213, 215 (1979). Section 1983 must be broadly construed in order to safeguard its extremely important function of providing protection against official violation of constitutional rights. Monell, 436 U.S. at 700-701 (1978); Monroe v. Pape, 365 U.S. 167, 172 (1961). Furthermore,

delay in outlining the contours of Monell, when coupled with the large number of §1983 cases in the federal courts, could lead to confusion, lengthier litigation, and erroneous results.

The importance of this Court's providing prompt guidance is underscored by the misapplication of Monell in the decision below. The Court of Appeals effectively ruled that Monell allows suit against a local governmental body only where that body maintains a policy which in haec verba requires the violation of constitutional rights. The district court had found — and indeed the defendants conceded throughout this litigation — that petitioner was arrested pursuant to a Police Department policy of arresting suspected prostitutes observed engaging unknown males in conversation and charging them with disorderly conduct. (A. 34; Def.'s Proposed Findings of Fact ¶ 22; Def.'s Proposed Conclusions of Law ¶ ¶ 31 and 33; Def.'s Post Trial Memorandum at 9; Def.'s Brief to the Court of Appeals at 25; Tr. at 187-88). Thus, for example, in their proposed conclusions of law defendants acknowledged that "defendants Bonarti and Colletti acted . . . pursuant to Police Department policy in arresting plaintiff" and that "defendant Codd . . . maintain[ed] a policy of arresting persons who engaged in such conduct [soliciting for prostitution] under Penal Law §240.20(5)." The district

court further found that as a matter of well-settled state law the conduct for which petitioner and tens of thousands of others were arrested pursuant to this policy did not constitute disorderly conduct. (A. 28).

The Court of Appeals nevertheless concluded that the Police Department could not be held liable under Monell for petitioner's unconstitutional arrest because the Department's policy did not state that arrests of suspected prostitutes were to be made without probable cause. (A. 13). By thus holding that Monell only authorizes suit against a municipal body where that body in some fashion acknowledges the illegality of its policy, the Court of Appeals has established a standard for municipal liability that could rarely if ever be met even in the most flagrant circumstances. Limiting municipal liability under §1983 to instances where a policy is acknowledged to be unconstitutional would be contrary to the legislative history of the 1871 Civil Rights Act and would render §1983 and Monell meaningless insofar as actions against governmental entities are concerned. Schnapper, 79 Colum. L. Rev. at 234; Note, "Municipal Liability Under Section 1983: The Meaning of 'Policy or Custom'", 79 Colum. L. Rev. 304, 316 (1979).

While a policy or custom which expressly called upon police officers to "arrest in the absence of probable

cause" would of course run afoul of the Fourth Amendment, that cannot be the only circumstance in which a Police Department could be held liable under §1983. Monell must also require that a department is liable for arrests made pursuant to a policy or custom of arresting persons for specified conduct where the conduct specified can not provide probable cause to believe that an offense has been committed.[7/] Here there was just such a policy. Petitioner was arrested pursuant to a policy which directed police officers to arrest women they observed conversing on the street with male strangers and to charge them wtih disorderly conduct. Since such activity does not constitute a violation of Penal Law 240.20(5) as that statute (and its predecessor) has been consistently construed by New York courts for fifty years, the policy in effect dictated the making of unlawful arrests, including the illegal arrest of petitioner. That is the very type of policy which must be actionable under Monell if §1983 is to retain its vitality.

7/ That the Police Department may have believed that such behavior provided probable cause for arrest is relevant only to the Department's good faith, if such a defense is even available. See infra at 13-16. It cannot obscure the fact that the Department's policy caused petitioner's unconstitutional arrest.

II

Local Governmental Bodies Should Not Be Allowed to Assert a Good Faith Defense to Suits Under Section 1983; Even If a Good Faith Defense is Available, the Police Department Is Not Entitled to Such a Defense in This Case.

The issue in this case, as it was decided by the district court and as it was briefed and argued by the parties to the Court of Appeals, involved the issue of whether qualified immunity will be made available to local governmental bodies sued under §1983. That issue, left open by Monell and now before this Court in Owen v. City of Independence, Missouri, 589 F.2d 335 (8th Cir. 1978), cert. granted, 48 U.S.L.W. 3217 (10/1/79) (No. 78-1779), is of course critically important to the future of civil rights litigation, bearing as it does on whether victims of unlawful governmental conduct will be compensated adequately and on whether official misconduct will be deterred effectively. See generally Newman, "Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct," 87 Yale L. J. 447, 455-62 (1978).

The Court of Appeals purported to avoid deciding this admittedly thorny issue of governmental immunity, but in fact decided it in a way which creates virtually insurmountable problems of proof for civil rights plaintiffs. By limiting municipal liability to situations in

which the policy of the municipal body acknowledged its own unlawfulness, the Court of Appeals conferred a greater immunity upon local governmental bodies than is available to local officials under Wood v. Strickland, 420 U.S. 308 (1975). See Point I, supra. Such a standard is clearly inconsistent with Monell and the purposes of §1983. Monell, 462 U.S. at 700-701. See also Scheuer v. Rhodes, 416 U.S. 232, 248 (1974).

Petitioner maintains that the Police Department as an entity should not be entitled to assert a defense of good faith. The language and history of §1983 compel the conclusion that Congress did not intend to confer such a defense on municipalities. Furthermore, the governmental interests which led this Court to fashion a good faith defense for public officials[8/] do not apply when the municipal body is the defendant. There is certainly no danger of unjustly obtaining damages from an official who is required by law to exercise discretion; nor is there any reason to believe that the possibility of municipal liability would deter an official from performing his required duties. Moreover, if municipalities are permitted to assert a good faith defense, Congress' primary purposes in enacting §1983 — to provide an effective remedy for rights which had prior thereto

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8/ See Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

gone unredressed, and to deter unconstitutional conduct — would be gravely undermined.

Even if a good faith defense similar to the qualified immunity now available to local officials were extended to cover local governmental bodies, the Police Department in the instant case would not be entitled to such a defense. In order to be shielded with qualified immunity, the Department must show that it acted in both objective and subjective good faith. Wood v. Strickland, 420 U.S. at 321; Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1348 (2d Cir. 1972) (on remand). See also Pierson v. Ray, 386 U.S. 547, 557 (1967). The Police Department could hardly claim that it believed its arrest of petitioner pursuant to its "dis-con-pros" policy was legal when its own legal counsel advised it beforehand that the "prostitution round-up" pursuant to which petitioner was arrested was unconstitutional and subjected the "police officers and their supervisors to liability for which there is no 'good-faith' defense." (Def.'s Ex. B). Furthermore, any belief on the part of the Police Department that petitioner's or any other "dis-con-pros" arrest was valid could not have been reasonable as a matter of law in view of well-settled state law that the type of conduct for which petitioner was arrested does not amount to a violation of Penal Law 240.20(5). (A. 28).

Because the Court of Appeals failed to reach these important issues concerning the type of immunity, if any, available to the Police Department in a §1983 suit, petitioner respectfully prays that this case be vacated and remanded in light of whatever decision this Court renders in Owen.

III

The Decision Below Conflicts with This Court's Rulings Concerning the Circumstances In Which Police Officers are Entitled to a Good Faith Defense.

This Court has often emphasized that officials must not be granted immunity indiscriminately lest §1983 "be drained of meaning" and its effectiveness as a remedy for official deprivations of constitutional rights be destroyed. Monell v. Department of Social Services, 436 U.S. 658, 701 (1978); Butz v. Economou, 438 U.S. 478 (1978); Scheuer v. Rhodes, 416 U.S. 232, 248 (1974). The decision of the Court below to confer qualified immunity on the arresting officers is clearly in conflict with the standard established by this Court for such a defense[9/] and presents exactly the grave dangers to the

9/ See Wood v. Strickland, 420 U.S. 308 (1975); Pierson v. Ray, 386 U.S. 547 (1967).

continued vitality of §1983 which have so concerned this Court.

The Court of Appeals by a two to one vote found that the arresting officers satisfied the objective requirement of the good faith standard despite the district court's unchallenged finding that a half-century of "well-settled" state law and the Practice Commentary on the very face of the statute clearly established that "the type of conduct engaged in by plaintiff was not within the scope of activities" prohibited by Penal Law 240.20(5). (A. 28). Furthermore, even though petitioner's arrest occurred after Police Department legal counsel issued an opinion that the arrest would be illegal and the arresting officers would not be entitled to a good faith defense, a majority of the Court of Appeals held that the officers had acted in subjective good faith. If defendants are entitled to a good faith defense even in these circumstances, it is indeed doubtful that persons whose rights are violated by the unconstitutional actions of police officers can ever obtain redress under §1983.

CONCLUSION

WHEREFORE, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

DEBORAH M. GREENBERG
MARGARET K. BROOKS
PATRICK R. COWLISHAW
Legal Action Center
19 West 44 Street
New York, New York 10036

Attorneys for Petitioner*

* Paul N. Samuels, a staff member of the Legal Action Center who has passed the New York State bar examination and is awaiting admission to the bar, assisted in the preparation of this petition.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

———*———

No. 460—August Term, 1978.

(Argued December 13, 1978 Decided June 28, 1979.)

Docket No. 78-7353

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ANA MARIA DOMINGUEZ,

Plaintiff-Appellant,

—v.—

ABRAHAM D. BEAME, individually and in his official capacity as Mayor of the City of New York, and his successors in office; MICHAEL J. CODD, individually and in his official capacity as Commissioner of the Police Department of the City of New York, and his successors in office; SIDNEY BAUMGARTEN, individually and in his official capacity as Assistant to the Mayor of the City of New York and as Chairman of the Midtown Law Enforcement Coordinating Committee, and his successors in office; THE POLICE DEPARTMENT OF THE CITY OF NEW YORK; SYLVESTER BONARTI, individually and in his official capacity as a police officer of the City of New York; FRANCIS COLLETTI, individually and in his official capacity as a police officer of the City of New York,

Defendants-Appellees.

———*———

Opinion of the Court of Appeals for the Second Circuit

Before:

TIMBERS and MESKILL, Circuit Judges, and
DOOLING, District Judge.*

———*———

Appeal from a judgment entered in the United States District Court for the Southern District of New York, Charles M. Metzner, Judge, dismissing an action brought under 42 U.S.C. § 1983 and the Fourteenth Amendment against the Police Department of the City of New York and various New York City officials and employees.

Affirmed.

HARLON L. DALTON, Legal Action Center of the City of New York, Inc. (Deborah M. Greenberg, Legal Action Center of the City of New York, Inc., New York, New York, of counsel), for Plaintiff-Appellant.

L. KEVIN SHERIDAN, Assistant Corporation Counsel, City of New York (Allen G. Schwartz, Corporation Counsel, Judith A. Levitt, Assistant Corporation Counsel, City of New York, of counsel), for Defendants-Appellees.

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* Hon. John F. Dooling, Jr., United States District Judge for the Eastern District of New York, sitting by designation.

Opinion of the Court of Appeals for the Second Circuit

MESKILL, Circuit Judge:

We are asked to reverse a judgment entered in the United States District Court for the Southern District of New York, Charles M. Metzner, Judge, dismissing an action brought under 42 U.S.C. § 1983 and the Fourteenth Amendment against the Police Department of the City of New York as well as various New York City officials and employees. The substance of the complaint was that appellant had been arrested for "status" rather than conduct, that she had been arrested without probable cause, and that she had been subjected to what she calls "summary punishment," that is, that the police had arrested her knowing that she would never be prosecuted. We affirm the judgment of the district court, although for reasons somewhat different from those relied on by the district judge.

Until 1973, women who were suspected by the New York City police of being engaged in prostitution-related activities, but against whom an arrest for prostitution could not be sustained, were arrested for "loitering." The statute that defined this offense read as follows:

> A person is guilty of loitering when he:
>
> . . .
>
> 6. Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon

> inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes . . . .

New York Penal Law § 240.35(6). The New York Court of Appeals declared this statute unconstitutional in People v. Berck, 32 N.Y.2d 567, 347 N.Y.S.2d 33, 300 N.E.2d 411, cert. denied, 414 U.S. 1093 (1973). See also United States ex rel. Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974), aff'd, 420 U.S. 283 (1975). After the Berck decision, the New York City police began the practice of arresting women they suspected of soliciting for purposes of prostitution for violations of New York's "disorderly conduct" statute, which reads in relevant part as follows:

> A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:
>
> . . .
>
> 5. He obstructs vehicular or pedestrian traffic.
>
> . . .

New York Penal Law § 240.20(5). This practice apparently ceased in 1976, when the New York legislature enacted a statute entitled: "Loitering for the purpose of engaging in a prostitution offense." New York Penal Law § 240.37. This statute became effective on July 11, 1976, the day before the opening of the Democratic National Convention in New York City, and has been held constitutional by the New York Court of

Appeals. People v. Smith, 44 N.Y.2d 613, 407 N.Y.S.2d 462, 378 N.E.2d 1032 (1978). Because the arrest in this case took place in November of 1975, it is the "disorderly conduct" statute with which we are concerned today.

Arrests of suspected prostitutes on charges of "disorderly conduct" came to be known as "dis-con-pros" arrests. From the record as it stands,[1/] it appears that virtually all of the suspected prostitutes who were arrested for "disorderly conduct" were released the next morning as a result of the district attorney's decision not to prosecute. The only exceptions to this practice appear to have occurred when an additional charge was lodged against the arrestee or when an outstanding warrant for the arrestee was discovered. This process of dismissing "dis-con-pros" arrests was known as "343-ing," the number referring to the form used by the district attorney's office to formalize the decision. The record also shows that the supervising officers and certain specific police officers in the 20th precinct, the precinct involved in the case, knew and understood that

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1/ We decline to reverse the evidentiary rulings made by the district court regarding the admissibility of certain documents. Our decision today rests upon our reading of the documents that were admitted into evidence and our review of the transcripts and papers submitted to the court.

most if not all of the "dis-con-pros" arrests effected in the 20th precinct would be "343-ed" by the district attorney.

As to the specific arrest at the center of this appeal, the district court made the following findings of fact, which we cannot characterize as clearly erroneous. Fed. R. Civ. P. 52(a). New York City police officers Sylvestri Bonarti and Francis Colletti were assigned to the midnight to 8:00 a.m. shift on November 8, 1975. While patrolling along Broadway in Manhattan they were flagged down by a gentleman who complained to them about being "hassled" by a woman as he walked down the street. He pointed to the appellant. The officers pulled over to the side of the street so that they could make their own observations of what was taking place. During the next few minutes, the appellant twice stopped male pedestrians and engaged them in brief conversations. Each of the men eventually walked away. She also spoke to someone in a car parked near the corner of Broadway and 84th Street. At that point, Officer Bonarti got out of the patrol car and placed the appellant under arrest. She was charged with "disorderly conduct." The arrest form filled out by the officers indicates that appellant was arrested because she "engaged various unknown males in conversation thereby causing an inconvenience to vehicle and

pedestrian traffic." Although the final typed version of the arrest form indicates that appellant was "[u]nemployed," the earlier handwritten version lists her occupation as "street walker." While appellant was being detained at the station house, an outstanding warrant for her arrest was discovered. The precise nature of the warrant, apparently dated June 9, 1975, is unclear from the record. The next morning, apparently without there having been any discussion with the arresting officers regarding the sufficiency of the evidence to support the arrest or the conviciton of appellant for "disorderly conduct," her arrest was "343-ed."

On March 6, 1976, a complaint was filed in the Southern District by the appellant individually "and on behalf of all others similarly situated." The named defendants were the Police Department of New York City, the Mayor and Assistant Mayor, the Commissioner of the Police Department, and the two arresting officers. The defendants other than the Police Department were sued both individually and in their official capacities. The substance of the complaint was that the appellant had been arrested not for conduct but for "status," that she had been arrested without probable cause, and that she had been subjected to "summary punishment" in violation of due process of law guaran-

tees. On November 21, 1977, the district judge denied class certification, a decision not challenged on this appeal. The district court issued its decision on the merits on June 21, 1978. It is the appeal from this decision that we consider today.

The district court held that appellant had been arrested without probable cause, basing that holding on judicial interpretations of the predecessor to the then effective "disorderly conduct" statute, § 722 of the New York Penal Law of 1909. See, e.g., People v. Nixon, 248 N.Y. 182, 161 N.E. 463 (1928); People v. Carcel, 3 N.Y.2d 327, 165 N.Y.S.2d 113, 144 N.E.2d 81 (1957). See also Practice Commentary to § 240.20 (McKinney 1967). Thus, the district court held, the appellant's civil rights were violated insofar as she was arrested without probable cause. However, the district court determined that appellant was not entitled to the relief requested. The court dismissed the complaint as to the Mayor and the Assistant to the Mayor because appellant "failed to link [them] to [her] arrest . . ." The appellant expressly declines to contest this dismissal on appeal. As to the arresting officers, the court held that, despite the fact that they had violated appellant's rights, they had satisfactorily established a good faith defense, citing Pierson v. Ray, 386 U.S. 547 (1967), and Bivens v. Six Unknown Named Agents of the Federal Bureau of

Narcotics, 456 F.2d 1339 (2d Cir. 1972) (on remand). This portion of the complaint was dismissed as to them. As to the Police Department and the Police Commissioner, the district court held that, assuming that these two defendants could be held responsible for the unlawful arrest of the appellant, they too were entitled to a "good faith defense" and that they had satisfied the requirements of that defense. Thus, this portion of the complaint was dismissed as to them as well. With regard to the claim that the defendants should be held responsible for subjecting appellant to "summary punishment" in violation of the due process clause, the district court reasoned:

> It would seem that a policy refusal by a district attorney not to prosecute persons arrested for disorderly conduct does not rise to the level of summary punishment of those nevertheless arrested by the police. First, it is the duty of police officials to carry out their enforcement duties. If the district attorney refuses to follow through with prosecution, that is his responsibility, for which he may be held answerable in other forums. Second, district attorneys in other counties within the city were prosecuting these cases and it would create an anomolous situation to have a single police department enforcing the same law in different ways in different portions of the city.

Accordingly, the district court declined to grant to the appellant the requested declaratory, injunctive and monetary forms of relief and dismissed the action in its entirety.

DISCUSSION

Section 1983 of Title 42 of the United States Code[2/] provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), The Supreme Court held that this statute was intended to cover "legal as well as natural persons," so it is clear that all of the named defendants can be properly sued under § 1983 for violations of civil rights. The question before us now, however, is not whether these defendants have been properly sued, but whether they may properly be held liable for the unlawful arrest of the appellant.[3/] We

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[2/] In light of Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (on remand), we need not consider appellant's complaint insofar as it attempts to state a cause of action directly under the Fourteenth Amendment.

[3/] The appellees have not persuaded us that the district court's conclusion in this regard was error. Accordingly, we base our decision today on the assumption that appellant was arrested without probable casue.

hold that they may not be.

The Supreme Court explained in Monell that:

> Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

436 U.S. at 690-91 (footnote omitted). The Court cautioned, however, that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." 436 U.S. at 691 (emphasis added). Accordingly, a municipality may not be held liable under § 1983 on a respondeat superior theory.

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent offical policy, inflicts the injury that the governemnt as an entity is responsible under § 1983.

436 U.S. at 694. In other words, in order for a governmental entity to be liable "for its own violations," 436 U.S. at 683, the plaintiff in a § 1983 action bears the burden of showing first that the governmental entity maintained or practiced an unconstitutional or unlawful "policy" or "custom," see also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, ___ U.S. ___, ___ n.29, 99 S.Ct. 1171, 1179 n.29 (1979), and second that that policy or custom "caused" or was the "moving force" behind the violation, see also Rizzo v. Goode, 423 U.S. 362, 370-71, 375, 377 (1976).

Using this analysis, we think it is quite plain that the Police Department should not be held liable for the violations of the appellant's rights that were either alleged or demonstrated. As found by the district court, "[t]he evidence in this case is clear that although there was a policy to arrest women suspected of being prostitutes on the charge of disorderly conduct, the policy was to arrest only those women actually observed engaging in activity which the police in good faith believed constituted an offense." This disposes of the appellant's argument that she was arrested for her "status;" the record shows that she was arrested for her conduct. Compare Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962). This also disposes of appellant's claim that the Department

should be held liable for the fact that she was arrested without probable cause. There was no departmental policy, and there was no showing of a departmental custom, to arrest suspected prostitutes under the "disorderly conduct" statute in the absence of probable cause. The fact that the police officers actually did arrest the appellant without probable cause is a matter to be considered in connection with the officers' individual liability for that arrest, not in connection with the Department's liability. As to the "summary punishment" aspect of the appellant's complaint, we note initially that her detention was not typical of what she alleges was the practice being engaged in. An outstanding warrant for her arrest was discovered while she was in custody. Thus, it cannot be said that her detention was based solely on the "dis-con-pros" arrest to which she had been subjected. Moreover, we join the district court in hesitating to hold the Department liable for policy decisions made by a separate unit of the city's governmental structure — the district attorney's office. The Police Department is responsible for arresting persons who appear to be violating the law, as long as there is probable cause to believe that they are doing so. It would not only be unfair to hold the police department responsible for the failure of the district attorney to prosecute, it would also create the oddest

of situations — police officers would be required to arrest persons for "disorderly conduct" in some areas of the city but not in others, depending upon the practices of the individual district attorneys. Whatever "summary punishment" appellant was subjected to here, see Menard v. Mitchell, 430 F.2d 486, 494 (D.C. Cir. 1970), the responsibility for it is not fairly attributable to the Police Department.

As to defendant Codd, then the Commissioner of the New York City Police Department, virtually the same considerations dictate the same result — dismissal. Again reverting to the findings of fact by the district judge, "[t]here is nothing in this case to indicate that anyone higher in the Police Department than Chief Inspector McCarthy[4/] was aware of the policy involved in this action," meaning the policy of arresting suspected prostitutes under the "disorderly conduct"

4/ McCarthy is a high-ranking officer in what is called the "Manhattan North Area." A Captain McCabe was the commanding officer of the 20th Precinct, in which appellant was arrested. McCabe was the one who instructed the officers to make arrests of suspected prostitutes when they had reason to believe that they were violating the "disorderly conduct" statute. McCabe sent a copy of his order to McCarthy, who responded by sending a copy of a memorandum from Isabel Wood, then Legal Advisor to Manhattan North.

(continued next page)

statute. Moveover, even if he had known about it, indeed, even if he had been responsible for it, there is nothing unlawful about the policy that existed — arresting persons for "disorderly conduct." And, as with the Department itself, even assuming that appellant was subjected to "summary punishment," there is nothing in the record to justify assigning responsibility for that action to Commissioner Codd. The dismissal of "disorderly conduct" arrests was solely a matter for the district attorney.

As far as the individual arresting officers are concerned, we see no basis for overturning the district court's finding that they acted in "good faith" when they placed the appellant under arrest. In defining the "good faith" defense that may be asserted by police officers when they are sued for having effected an arrest without probable cause, this Court has stated:

> [T]o prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective

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Wood's memo indicated that arrests for "status" were illegal and that the implementation of McCabe's order would therefore be illegal. She also indicated that an arrest with knowledge of inevitable dismissal would be unlawful. McCabe asked McCarthy for advice, and McCarthy said to go ahead with the arrests as long as the proper observations of conduct were made and documented.

> and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. We think, as a matter of constitutional law and as a matter of common sense, a law enforcement officer is entitled to this protection.

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra, 456 F.2d at 1348. Judge Lumbard explained the contours of this defense in the following fashion:

> If the complaint states a cause of action and the plaintiff adduces substantiating proof, the defendant will have to disprove the allegation that he acted without probable cause, or show that, in any event, he acted in good faith and with a reasonable belief in the validity of the arrest and search.
>
> Ordinarily when a suit of this type is brought a court will already have determined that there was no probable cause for the arrest and search complained of. Nevertheless the agent has a complete defense if he can convince the trier of the fact that he acted in good faith and that it was reasonable for him to have believed that the arrest and search were lawful. Thus there are two standards to be considered. The first is what constitutes reasonableness for purposes of defining probable cause under the fourth amendment for the protection of citizens against governmental overreaching. The other standard is the less

> stringent reasonable man standard of the tort action against government agents. This second and lesser standard is appropriate because, in many cases, federal officers cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves. It would be contrary to the public interest if federal officers were held to a probable cause standard as in many cases they would fail to act for fear of guessing wrong. Consequently the law ought to, and does, protect government agents if they act in good faith and with a reasonable belief in the validity of the arrest and search.

Id. at 1348-49 (Lumbard, J., concurring). See also Jaroslawicz v. Seedman, 528 F.2d 727, 732 (2d Cir. 1975); Laverne v. Corning, 522 F.2d 1144, 1147-48 (2d Cir. 1975). See generally Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L. J. 447, 459-62 (1978).

We decline to overturn the district court's finding that the officers acted in subjective good faith, based as it is on a determination of witness credibility, and we find it reasonable for the officers to have believed that the conduct engaged in by the appellant gave them sufficient reason to place her under arrest for "disorderly conduct."

The New York Court of Appeals described the determination of probable casue in the case of People v.

Smith, supra:

> Probable cause exists where the facts and circumstances with n the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed.

44 N.Y.2d at 622, 407 N.Y.S.2d at 467, 378 N.E.2d at 1037. It is our judgment that, for purposes of this § 1983 action Officers Bonarti and Colletti beleived reasonably that this standard had been met. One pedestrian actually stopped them to complain about being bothered by a woman on the sidewalk, and he pointed to the appellant as the perpetrator. And the officers themselves observed the appellant stop pedestrians and engage them in conversations. The fact that the statute here in question had not previously been construed under circumstances similar to those presented by this case supports our conclusion that although there was not in fact probable casue to arrest the appellant on a charge of "disorderly conduct," the arresting officers' belief that there was probable cause was not unreasonable. C.f. People v. Macbeth Realty Co., 63 App. Div. 2d 908, 910, 406 N.Y.S.2d 298, 299-300 (1978) (Sullivan, J., dissenting) (suspected prostitute arrested and convicted under "disorderly conduct" statute); People v. Miller, 90 Misc.2d 399, 394 N.Y.S.2d 1006 (1977) (woamn arrested for prostitution pleads to disorderly conduct).

Thus, the officers are not liable for arresting the appellant without probable cause. As with the other defendants, we decline to hold the officers liable for the policy of arresting suspected prostitutes under the "disorderly conduct" statute, that policy being in no way unlawful, and we decline to assign liability to the officers for whatever unlawful "summary punishment" may have been inflicted on the appellant in this case.

The judgment of the district court is affirmed.

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DOOLING, District Judge (dissenting in part):

The evidence, it would appear, does not support the trial court's finding that the defendants Bonarti and Colletti had established a defense of good faith. Leaving to one side the question whether Officer Colletti was sufficiently a participant in rather than a bystander at the arrest, the evidence seems plainly to preclude a finding that the officers could reasonably have believed that the arrest was supported by probable cause. The disorderly conduct statute, Penal Law, § 240.20, subdivision 5, had a settled meaning that went back to the predecessor statute, Section 722, subdivision 2, of the former Penal Law; the statute required that the defendant's conduct be characterized, not by its effect on individuals, but by its public consequence.

E.g., People v. Szepansky, Steuben Co. 1960, 25 Misc. 2d 239, 203 N.Y.S.2d 306 (Gabrielli, J.). Statutory disorderly conduct requires, in the language of People v. Harvey, 1954, 307 N.Y. 588, "that the acts charged must be such as are public in character and breach the public peace, or tend to do so. . . ." See also People v. Chesnick, 1950, 302 N.Y. 58, 60-61. People v. Pritchard, 1970, 27 N.Y.2d 246, 248-249, emphasizes the persistence under the statute in its present form of its limitation to proscription of behavior threatening a breach of the peace or public inconvenience, annoyance or alarm. See also People v. Cannor, App. Term 1975, 88 Misc.2d 85, 388 N.Y.S.2d 812, aff'd., 1976, 40 N.Y.2d 886. That is, indeed, clear from the language of the statute: the person charged must have acted

> "with intent to create public inconvenience, annoyance or alarm, or recklessly creating a risk thereof."

Officer Bonarti observed no such conduct. Around 1:00 A.M. he saw plaintiff appellant leaning against a car, saw her beckon to a man who talked to her and then walked away, and, a moment later, saw her walk over to another passing man and speak to him for a moment or so at about the midpoint of the sidewalks that meet at the corner of Broadway and West 84th Street. Officer Colletti's testimony was similar, but he added that he observed plaintiff speaking, from the

passenger side, to someone in a car. A man had earlier complained to the officers of plaintiff's solicitation and had pointed plaintiff out to them, but refused to give his name, and Officer Bonarti testified that the intersection was one frequented by prostitutes. Nothing in this evidence suggests the remotest approach to a breach of peace, or to any public disorder, or threat of it, or, specifically, of obstructing public passage in the street. Officer Bonarti clearly understood the statute. He explained the statute thus:

> "So far as I understand that law, it is if someone impedes the flow of vehicular or pedestrian traffic and also causes a public inconvenience, annoyance, then they are in violation of the section."

There was in what the officers testified that they observed nothing of the impeding of public traffic, nothing of threat to public order; the complaint's characterizing the observed conduct as engaging various males in "conversation thereby causing an inconvenience to vehicle and pedestrian traffic" makes it clear that was no interference with the flow of traffic other than that implicit in any brief conversation between two people meeting on the street.

It might have been wondered whether the officers' action disappointed any expectation of their superiors, but the testimony of Captain McCabe forbids the inference that officers were expected to arrest without

probable cause — despite Captain McCabe's at best ambiguous "Prostitution Roundup" Memorandum of October 21, 1975, and departmental counsel's warning that the Memorandum might be considered discriminatory in punishing some people for behavior that all engage in under the pretense that those arrested are obstructing traffic when there is no traffic to obstruct. Cf. People v. Nixon, 1928, 248 N.Y. 182, 187-188. In any case reliance on superiors' orders would be relevant primarily to the matter of the officers' subjective beliefs. Important as the subjective belief of arresting officers may be on damage issues, the Court has been clear that if the constitutional liberty is to be safe from infringement, the ultimate test must be the objective reasonableness of the arresting officer's belief that the arrest is warranted in law. Cf. Terry v. Ohio, 1968, 392 U.S. 1, 21-22; Pierson v. Ray, 1967, 386 U.S. 547, 555-557; Scheuer v. Rhodes, 1974, 416 U.S. 232, 244-246; Wood v. Strickland, 1975, 420 U.S. 308, 321-322; Procunier v. Navarette, 1978, 434 U.S. 555, 561-562. That reasonableness was absent here.

It is concluded that an erroneous standard of reasonable belief was applied to the facts in the district court, and that, in consequence, dismissal of appellant's complaint against the arresting officers was error.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
76 Civ. 1117 (CMM)

———*———

ANA MARIA DOMINGUEZ,
Plaintiff,
-against-
ABRAHAM D. BEAME, et al.,
Defendants.

———*———

METZNER, D. J.:

Plaintiff has brought this action pursuant to 42 U.S.C. § 1983 and the First, Fourth, Eighth and Fourteenth Amendments to the Constitution of the United States. She is seeking damages and declaratory relief with regard to what she alleges was an illegal arrest of her person. The court has jurisdiction over the subject matter of this action. 28 U.S.C. § 1343(4) and 28 U.S.C. § 1331(a).

Testimony was taken by the court, without a jury, on June 2 and 5, 1978. The following constitutes the court's findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

Plaintiff testified that she had not been employed for the past five or six months, but before that had

worked in two massage parlors, the Murray Hill Health Spa and the Casbah, respectively, for over two years. On the evening of November 7, 1975, she claims that she was sitting for about five minutes on the fender of a car that was parked on Broadway near 84th Street, waiting for her roommate, when a police car drove up. This would be a few minutes before midnight. She further testified that two police officers, defendants Bonarti and Coletti, came out of the police car and placed her in the car and took her to the 20th Precinct station-house where her arrest was processed. She testified that she was not informed as to the reason for her arrest, but noticed that the police indicated on her arrest form that she was a "streetwalker." She strenuously objects to such characterization and asserts that there is absolutely no basis for the charge.

Each of the police officers testified that prior to plaintiff's arrest, they were stopped by a person on the street who complained to them about being "hassled" by plaintiff as he walked down the street. Bonarti and Coletti each testified that the man who stopped them pointed to the corner of Broadway and 84th Street and indicated that he was referring to plaintiff as the one who had approached him.

The two police officers further testified that prior to arresting plaintiff, they observed her actions for a

few minutes. Bonarti testified that he observed plaintiff beckon to a man as he walked past plaintiff. He saw the man stop, engage in a brief conversation with plaintiff and then walk away from her. Bonarti claims that he thereafter observed plaintiff approach and stop another man as he walked along Broadway. Coletti testified that he also observed plaintiff talking to someone in a car near the corner of Broadway and 84th Street.

Bonarti claims that only after making these observations did he leave his patrol car and arrest plaintiff for having violated section 240.20 of the New York Penal Law. Coletti testified that he did not approach plaintiff while Bonarti made the arrest, but stood approximately one car length away.

There exists a conflict between these two versions not only as to the alleged actions of the participants, but as to the timing of the arrest itself. Bonarti and Coletti claim that plaintiff was arrested at approximately 1:00 A.M. on November 8, 1975. The testimony of Dorn taken by deposition on behalf of plaintiff after conclusion of the live testimony is not helpful to plaintiff. In fact, it is contradictory in part to plaintiff's story and is pure hearsay in many respects.

The court finds that the officers' story as to time of arrest and plaintiff's actions is the more credible. This

conclusion is based upon the documentary evidence prepared contemporaneously with the events and at a time when there was no indication that this lawsuit would ensue. First, Bonarti and Coletti did not begin their tour of duty until midnight. Second, Bonarti arrested three other women prior to arresting plaintiff, and these three arrests were made at approximately 12:30 A.M., followed by taking the women to the stationhouse for processing. The arrest form of plaintiff indicates that she was arrested at 1:00 A.M. She must have been at this corner for over an hour, and not for just five minutes.

The fact that the court finds that plaintiff, at the time of her arrest, was engaging in activity indicating solicitation for prostitution does not end the matter. We are still faced with the issue of whether plaintiff's rights were nevertheless violated when she was arrested for violation of section 240.20.

Plaintiff was arrested, according to the arrest form, because she "engaged various unknown males in conversation thereby causing an inconvenience to vehicle and pedestrial [sic] traffic."[1/] It is claimed that such

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[1/] It must be made clear that section 240.20 was the only law in existence at the time which the police could use in the circumstances. Subsequently, a new law was enacted to combat "streetwalking," section 240.37,

(continued next page)

conduct is a violation of section 240.20(5) of the New York Penal Law. Specifically, that statute says:

> "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: . . .
>
> 5. He obstructs vehicular or pedestrian traffic . . . ."

That section of the Penal Law became effective on September 1, 1967. However, a similar statute had been in effect in New York since 1923. New York Penal Law of 1909 § 722, as amended. The courts of New York have had many opportunities to define the scope of activity which may be considered "disorderly conduct."

The leading case in this area is People v. Nixon, 248 N.Y. 182 (1928). In that case a number of persons were convicted of disorderly conduct for marching on a public street, four abreast. As a result of their marching, a number of pedestrians walking on the sidewalk were forced to enter the roadway in order to get past them. The New York Court of Appeals reversed the convictions, finding that defendants' simple presence on the sidewalk, where there were no threats of violence or likelihood that there would be

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effective July 11, 1976, which was held to be constitutional by the New York Court of Appeals on June 15, 1978.

violence, was not a criminal activity. The fact that other pedestrians were actually forced to leave the sidewalk in order to get past the defendants was still insufficient to sustain a charge of disorderly conduct:

> "In the absence of evidence that the defendants caused substantial annoyance to others, or persisted in their conduct after protest from others or warning from a police officer, we find the evidence insufficient to sustain the conviction of the defendants in this case." Id. at 188.

The New York Court of Appeals in People v. Carcel, 3 N.Y.2d 327 (1957), reaffirmed the rule of Nixon in regard to prosecutions for disorderly conduct. The court specifically stated that a conviction could not be sustained where the only evidence was an observation by a police officer that a defendant's action resulted in the blocking of another pedestrian's right of way. Id. at 332.

Not only is the case law in this area well settled, but the Practice Commentary to section 240.20(5) makes it clear that the type of conduct engaged in by plaintiff was not within the scope of activities the legislature had sought to prohibit in its enactment of the statute.

> "Subdivision 5, which is new, proscribes conduct which can be of a serious nature (e.g. creating havoc by tieing up rush hour traffic on a crowded highway for an extended period in order to call attention to some cause)."
> Denzer & McQuillan, Practice Commentary N.Y. Penal Law § 240.20 (McKinney 1967).

Thus, it seems clear that the mere act of stopping "various unknown males" upon the street and engaging them in brief conversation, could never rise to the level of disorderly conduct.

Furthermore, the statute requires a showing of "intent" or "recklessness" before the activity can be considered criminal. From what the police officers observed, it would be logical to assume that she was stopping the various unknown males with the intent to solicit their business and not with the intent to create a disturbance. However, prior to the enactment of section 240.37, see footnote 1, the observed conduct would not justify an arrest for solicitation or loitering for the purpose of prostitution. The fact that plaintiff's presence on the streets annoyed some citizen is insufficient to allow an arrest to be made pursuant to a charge of disorderly conduct.

Thus plaintiff's arrest on the charge of disorderly conduct was clearly a violation of her civil rights. In addition, a claim has been presented predicated on an alleged practice and procedure of defendants to summarily punish persons arrested as streetwalkers without due process of law, i.e., to arrest them and keep them in jail overnight with the knowledge and intent that they would not be prosecuted for the act for which they had been arrested.

Before proceeding, the court must rule on the admissibility of various exhibits offered by plaintiff in connection with her claim in this area. Plaintiff's Exhibits 19, 20, 24, 28, 29, 30, 31, 34, 35, 42 and 45 marked for identification are found to be inadmissible.[2/]

Turning now to the substance of the issue of whether plaintiff's arrest was intended by defendants to be a summary punishment of her. Captain McCabe testified that in November of 1975 it was the policy of the

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[2/] The court had indicated during trial that as none of these exhibits related to the 20th Precinct, but rather to the area known as Manhattan South, they would not be admitted into evidence unless they could be connected to the 20th Precinct.

Following the conclusion of the trial, plaintiff submitted a document, which has been marked for identification as Plaintiff's Exhibit 47. Plaintiff contends that this exhibit connects the previously marked exhibits to the area where the arrest of plaintiff was made. The court, however does not agree. First, the document is dated December 11, 1975, which is a month after plaintiff's arrest. Second, the memo merely transmits the guidelines used in the Manhattan South area to Chief McCarthy of Manhattan North with the suggestion, "You might find this useful in formulating your own guidelines." Therefore, neither Plaintiff's Exhibit 47 nor those listed above will be admitted into evidence.

District Attorney's office in Manhattan to "343"[3/] all dis-con-pros[4/] arrests. He further testified that he was aware of this policy at the time he issued his memorandum of October 21, 1975, directing that these arrests be made. However, he was the commanding officer of the 20th Precinct, and street solicitation by prostitutes was a continuing problem prompting constant complaints by the residents of the neighborhood. He intended arrests to be made on probable cause. Bonarti admitted that prior to arresting plaintiff, he had received and read Captain McCabe's memorandum, which contained a reference to the procedure that was to be followed if the district attorney "343d" the arrest. That procedure is covered by McCabe's memorandum # 143.

It would seem that a policy refusal by a district attorney not to prosecute persons arrested for disorderly conduct does not rise to the level of summary punishment of those nevertheless arrested by the police. First, it is the duty of police officers to carry out their

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[3/] This refers to the number of the form used by the D.A.'s office when that office declines to prosecute an action based upon the insufficiency of the evidence. The term "343" is used to describe this procedure.

[4/] This is the term used to describe prostitution-related arrests made pursuant to the disorderly conduct statute, N.Y. Penal Law § 240.20(5).

enforcement duties. If the district attorney refuses to follow through with prosecution, that is his responsibility, for which he may be held answerable in other forums. Second, district attorneys in other counties within the city were prosecuting these cases and it would create an anomalous situation to have a single police department enforcing the same law in different ways in different portions of the city. Consequently, I find that there is no basis for recovery on the second claim by plaintiff.

However, plaintiff's rights as based on her first claim were violated by her arrest, and we then must decide which of the defendants is liable in damages to plaintiff.

Plaintiff has failed to link either defendants Beame or Baumgarten to plaintiff's arrest and accordingly, the complaint as to them must be dismissed.

Defendants Bonarti and Coletti did in fact violate plaintiff's right when they arrested her. However, the court finds that in view of all the circumstances leading up to her arrest—the orders that they were given and the care they exercised in carrying out those orders—these defendants have established a defense of good faith. Pierson v. Ray, 386 U.S. 547 (1967); Biven v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972). The complaint is dismissed as to them.

Plaintiff claims that both defendants Codd and the Police Department of the City of New York are liable to her for her arrest.[5/] Normally, such defendants cannot be held liable on a theory of respondeat superior. However, liability may be imposed on a showing that they had actual or constructive knowledge of the acts performed by their subordinates, and acquiesced in such conduct. E.g., Manfredonia v. Barry, 401 F. Supp. 762 (E.D.N.Y. 1975). There is nothing in this case to indicate that anyone higher in the Police Department than Chief Inspector McCarthy was aware of the policy involved in this action. However, defendant Codd in his proposed findings of fact accepts responsibility for the policy.

Assuming that these two defendants are responsible for the policy and practice that resulted in plaintiff's arrest, we must examine whether these defendants nevertheless have a defense of good faith. The test of good faith was enunciated in Bivens v. Six Unknown Named Agents, 456 F.2d at 1348:

5/ The complaint stated a claim against the Police Department directly under the Fourteenth Amendment. It is now settled that the Police Department can be held liable directly under 42 U.S.C. § 1983. Monell v. Department of Social Services, 46 U.S.L.W. 4569 (U.S. June 6, 1978).

> "Therefore, to prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable."

This standard should also be applicable to the officer's superiors.

The evidence in this case is clear that although there was a policy to arrest women suspected of being prostitutes on the charge of disorderly conduct, the policy was to arrest only those women actually observed engaging in an activity which the police in good faith believed constituted an offense. There is no question that the police instituted this policy in the good faith belief that streetwalkers soliciting customers on the street constituted disorderly conduct. Considering the activity which this policy was attempting to stem, and the fact that the disorderly conduct statute was a valid law, it appears that the police were reasonable in their good faith belief. Accordingly, the claim for monetary damages as against these two defendants is dismissed.

Plaintiff is not entitled to declaratory relief since arrests for this activity now are made under the new law recently held constitutional. See footnote 1. The issue is moot.

Plaintiff's claim for the expungement of all records of arrest made pursuant to the practice described above is denied without prejudice to any rights plaintiff may have under N.Y.C.P.L. § 160.50 (McKinney, Supp. 1977-78).

This action is dismissed.

So ordered.

CHARLES M. METZNER
U.S.D.J.

Dated: New York, N.Y.
June 21, 1978